APPEAL NO. 92014

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1992). On December 16, 1991, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. Ms. D determined that the employee, (claimant), the respondent herein, sustained a compensable injury in the course and scope of his employment as laborer for ("Employer"). The appellant seeks review of the hearing officer's determination that a compensable injury occurred, and argues that her decision is against the great weight and preponderance of the evidence so as to be manifestly wrong and unjust.

DECISION

We find that the evidence supports the findings and conclusions of the hearing officer and affirm her decision.

A brief statement of the facts follows: the employer installs utility lines for municipal and private enterprises. On (date of injury), a street was being stripped of concrete and asphalt by employer for the purpose of installing a utility line. This operation involves breaking of pavement with a large circular "saw", then manually cutting "rebar" steel pipes that are imbedded in the concrete pavement into 12-inch lengths, so that the pavement will come up in pieces. The concrete, asphalt and rebar pieces are then removed with a backhoe. Respondent was assigned to cut rebar pieces ahead of the backhoe. Respondent testified that as he was bending over, he heard a noise, and he was struck in the head from behind. Respondent fell and ended up sitting down by a "ditch". (A subsequent witness described the ditch as an 8-inch deep trench.) Other employees came up and asked him what had happened, including the operator of the backhoe. At this time, his head and neck hurt. He testified that he did not tell anyone why his head hurt. He completed his job that day, however, and worked the next day, Friday,16th. Respondent did not initially seek medical treatment because he believed his injuries were minor and his headache would go away. However, the pain increased to include his "waist" and leg. Respondent testified that he saw (Dr. G) on Monday August 19th. Dr. G's records indicate that respondent visited the office on August 20th, and told him that he was hit in the head by the scoop on a bulldozer. Dr. G's diagnosis, which carries through months of medical records was cervical strain/sprain, lumbar strain/sprain, and knee or leg strain/sprain. A "CT" scan conducted September 20, 1991 of respondent's cervical spine was normal.

Respondent stated that he told two cousins, who also worked for the employer, to tell his boss, (Mr. C), on Monday that he was going to the doctor. He was terminated Monday for not showing up at work. He testified that he never personally told Mr. C he was injured at work.

Two transcripts of recorded statements given by his cousin/co-workers, (Mr. D) and (Mr. S), were admitted into the record. (The statements were given September 10, 1991,

to a "(Ms. P)," whose identity is not clear in the record.) Mr. D stated that respondent was wearing a hard hat. He saw respondent laying or sitting in the ditch on the 15th, and, when he asked respondent what happened, respondent said that the machine hit him in the head. He stated that respondent complained about feeling a little bit sick on Friday. The time of the occurrence was 2:00 p.m.

Mr. S said that he did not see the incident itself, but saw respondent sitting down, and when Mr. S asked what happened, respondent replied that his head hurt and the machine hit him. Mr. S observed a mark on his head from the hard hat. Mr. S rode home with respondent, and on the way home that evening after work respondent complained of neck pain.

Another statement was given by (Mr. A) who operated another backhoe. He initially stated that respondent never told him that he was injured on the job, but near the end of his statement conceded that he saw respondent sitting on the ground on the 15th, with several people around him. He said that that he "went to see what happened," and that when he asked respondent, he was told that he was hit by "the machine."

(Mr. PA) testified that he was driving the backhoe that was working behind respondent on (date of injury). He said that when operating the backhoe, he faces the bucket and watches it constantly. He stated that he did not see the bucket make contact with respondent. Under cross-examination, Mr. PA said, "I have a whole area here that you keep an eye on, on both sides, plus in front where you're digging, because you can't just keep your eye just right on the bucket itself." He testified that respondent was working at the "ditch," about 15 to 20 feet from the backhoe. Mr. PA stated that when the backhoe is picking up concrete, it is anchored with stabilizers that hold it in place so that it cannot lurch forward. There is also a locking device on the transmission control to prevent the machine from accidentally jumping gear. Mr. PA testified that when laborers worked too close to the backhoe, there is the possibility that rocks and concrete could fly up and hit them.

When asked about the time of the incident, Mr. PA stated that he only took his eyes off the bucket when he straightened his wheels, and that, during this maneuver, which took about 10 to 15 seconds, he would "usually" put the bucket on the ground, or next to him. He could not specifically recall if the bucket was on the ground on (date of injury) around the time of the alleged injury, but believed that it was. When expressly asked if respondent ever did any of his work within reach of the bucket, Mr. PA testified that "I try not to let them do that, you know, sometimes they get busy and they don't sometimes really watch what's going on, and it's my responsibility to do this, to watch and make sure, the safety of the guy, because I'm responsible for that machine." He stated that he looked away from the bucket to straighten his wheels, and when he looked back up, respondent was sitting on the ground. He stated that he said to him, "Hey, what's wrong?" Mr. PA testified that respondent didn't say anything.

(Mr. C), an owner of the employer, testified that he saw respondent sitting down and

thought he was taking a break. He went up and asked respondent what he was doing; he stated that respondent said nothing but got up and resumed work. He testified that respondent worked that day and the next day and was not scheduled to work that weekend. On Monday, respondent's cousins, Mr. D and Mr. S, reported to Mr. C that he was out to attend to personal business. Mr. C stated that in previous months respondent had taken approved days off to attend to personal business. Mr. C stated that, on this Monday, respondent did not have advance approval; he told Mr. D and Mr. S that respondent was terminated. The next day, he was telephoned by Dr. G who reported that respondent was injured on the job, and asked if Mr. C would cover the injury. Mr. C testified that he told Dr. G that this would be his own expense because respondent was not hurt on the job. Under cross-examination, a portion from a statement given by Mr. C was read into the record, and it indicated that Mr. C responded that he disbelieved that respondent could have been injured on the job because he worked on the 15th and the 16th; "if you're hurt, you're not going to work two days in a row."

The hearing officer is the sole judge of the weight, materiality, relevance, and credibility of the evidence. Art. 8308-6.34 (e). Her decision should not be set aside because different inferences and conclusions may be drawn on review, even though the record contains evidence of inconsistent inferences. Garza v. Commercial Insurance Co. of Newark, N.J., 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact is entitled to draw reasonable inferences from direct evidence and facts proven. Western Casualty & Surety Co. v. Carlson, 317 S.W.2d 259 (Tex. Civ. App.-San Antonio 1958, writ ref'd n.r.e.). The claimant has the burden of proving by competent evidence that an injury occurred within the course and scope of his employment. Reed v. Aetna Casualty & Surety Co., 535 S.W.2d 377 (Tex. Civ. App.-Beaumont 1976, writ ref'd n.r.e.). The finder of fact has the right to judge the credibility of the claimant and weight to be given to his testimony, in light of other testimony in the record. Burelsmith v. Liberty Mutual Insurance Co., 568 S.W.2d 695 (Tex. Civ. App.-Amarillo 1978, no writ). The testimony of a claimant can be sufficient to establish a compensable claim. Highlands Insurance Co. v. Baugh, 605 S.W.2d 314 (Tex. Civ. App.-Eastland 1980, no writ). Only if the evidence supporting the hearing officer's determination is so weak, or if the decision is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust, is it appropriate for the trier of fact to be reversed on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

In this case, the preponderance of the evidence points to an injury on (date of injury). The hearing officer found that the injury occurred when the bucket of the backhoe struck respondent in the head. However, from the record in this case, the hearing officer could have found the blow to the head to result from a possibility advanced by direct testimony by one of appellant's own witnesses: that a rock or piece of pavement flew up from the backhoe (Testimony of Mr. PA, Transcript, page 48). We do not agree that the record supports appellant's contention that it was mechanically impossible for the backhoe to strike respondent. It is possible to infer from the record, as the hearing officer apparently did, that respondent got within range of the backhoe and was not seen by the operator of the backhoe. No one disputed, and numerous witnesses corroborated, the fact that

respondent was observed sitting down near the ditch, and that a number of people, including the operator of the backhoe, went up to him to ask what happened. Respondent's reported failure to respond to all questions right away, or to even report the injury on the spot, may not be inconsistent depending on the effect of a blow to the head. While appellant argues that it is impossible for the accident to have happened precisely as described by respondent, we would note that it is not incumbent upon a claimant to establish in precise detail how an injury occurred, in order to persuade the finder of fact that he suffered a compensable injury. See Scott v. Millers Mutual Fire Insurance Co., 524 S.W.2d 285 (Tex. 1975).

The record contains sufficient evidence to support the findings, conclusions, and decision of the hearing officer, and is hereby affirmed.

_____

Susan M. Kelley
Appeals Judge

CONCUR:

_____

Robert W. Potts
Appeals Judge

_____

Joe Sebesta
Appeals Judge